

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DERRICK JOHNSON, et al.,

Plaintiff,

v.

U.S. BANCORP, et al.,

Defendants.

CASE NO. C11-02010 RAJ

ORDER

INTRODUCTION

This matter comes before the court on Plaintiffs Derrick and Amy Johnson's ("Plaintiffs") motion to compel and for sanctions. Dkt. # 112. Defendants U.S. Bancorp, U.S. Bank National Association d.b.a. U.S. Bank, John Doe 1, John Doe 2, Jane Doe 1, and Jane Doe 2's ("Defendants") oppose the motion. Dkt. # 121. Having considered the memoranda, exhibits, and the record herein, the court DENIES in part and GRANTS in part Plaintiffs' motion.

BACKGROUND

This court has previously discussed the substantive and procedural background of this case. *See* Dkt. ## 58 at 3–4; 70 at 1–2. To briefly summarize, this case arises from allegations that Defendants provided negative, false information about Mr. Johnson to his employer, KeyBank. *See* Dkt. # 92 (Second Amended Complaint) ¶¶ 4.1–4.14. At issue

1 in the instant motion is an anonymous letter (later determined to be authored by Mr.
 2 Johnson's ex-wife, Rachael) that U.S. Bank received regarding Mr. Johnson. Dkt. # 112.
 3 Plaintiffs maintain that Defendants communicated the contents of the letter to KeyBank.
 4 *See id.*

5 In their initial disclosures, served on Plaintiffs in April 2012, Defendants listed
 6 Kandis Sells, an attorney at Dorsey & Whitney and former counsel for U.S. Bank, as a
 7 potential witness with regard to the letter.¹ Dkt. # 122-1 (Ex. A to Schulman Decl.) at 4,
 8 7. They stated that Ms. Sells "will have information as to the receipt and custody of the
 9 letter Rachael Johnson wrote regarding Derrick Johnson's improper conduct." Dkt.
 10 # 122-1 at 4. Later, in their answers to Plaintiffs' interrogatories regarding the letter,
 11 Defendants stated that U.S. Bank employee Helen Creekmore "contacted U.S. Bank's
 12 outside counsel, Kandis Sells of Dorsey & Whitney LLP, who picked up the original
 13 letter from Ms. Creekmore the same day." Dkt. # 122-2 (Ex. B to Schulman Decl.) at 4.
 14 Defendants served this response in November 2012. *Id.* at 6.

15 Defendants made supplemental disclosures on February 25, 2013.² Dkt. # 113-10
 16 (Ex. J to Hammack Decl.). Three days later, Defendants mailed a privilege log to
 17 Plaintiffs, which Plaintiffs received on March 5th.³ Dkt. ## 113-12 (Ex. L to Hammack
 18 Decl.) at 2; 122 (Schulman Decl.) ¶ 7. The log contained only one entry, describing the

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 20 ¹ In their motion to compel, Plaintiffs contend that they had no knowledge that Ms. Sells
 21 would be a potential witness until February 25, 2013, when Defendants supplemented their
 22 initial disclosures. Dkt. # 112 at 1, 4-5 & n.2. Defendants provided a copy of their initial
 23 disclosures in their response to Plaintiffs' motion, which demonstrates that this disclosure was in
 24 fact made a year ago. Dkt. # 122-1 at 7. Plaintiffs do not dispute this evidence in their reply. *See*
 25 *generally* Dkt. # 138.

26 ² Plaintiffs state that "the Court failed to include a date by which Defendants were to
 27 supply some of those supplemental responses and a privilege log," and, "[a]s a result, Defendants
 refused to supply the supplemental responses until February 25th, 2013, the new deadlines for
 discovery." Dkt. # 112 at 2. Defendants' conduct with regard to the supplemental disclosures
 provided on that date was not improper—the court's order stated that "[f]act discovery, including
 the production of documents, must be completed by February 25, 2013." Dkt. # 95 at 9.

³ Although Plaintiffs had previously accepted service via email, they withdrew their
 consent to such service on February 26th. Dkt. # 122-4 (Ex. D to Schulman Decl.) at 2.

1 privileged documents as “Emails and file documents mentioning the anonymous letter re
 2 Derrick Johnson,” and listing the author as “Dorsey & Whitney.” Dkt. # 113-11 (Ex. K
 3 to Hammack Decl.) at 2. Plaintiffs objected to the lack of detail in the privilege log, and
 4 Defendants provided a more detailed, three-page log via e-mail later that day. Dkt.
 5 ## 112 at 2; 122 ¶ 9. Plaintiffs now ask this court to review the documents identified in
 6 the privilege log *in camera*, stating that “some of [the documents] appear to be directly
 7 relevant and/or there appears to be an issue as to whether a privilege would apply.” Dkt.
 8 # 112 at 6.

9 ANALYSIS

10 Defendants’ privilege log identifies both attorney-client privilege and attorney
 11 work product doctrine as the bases for withholding documents. Dkt. # 113-14 (Ex. N. to
 12 Hammack Decl.) at 2–4. The court therefore analyzes each of these principles in turn.

13 1. Attorney-Client Privilege

14 The attorney-client privilege is one of the oldest privileges known to the common
 15 law. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted). “Its
 16 purpose is to encourage full and frank communication between attorneys and their clients
 17 and thereby promote broader public interests in the observance of law and administration
 18 of justice.” *Id.* However, the privilege may be waived under certain circumstances, and
 19 whether a privilege-holder has done so in a particular instance is a mixed question of law
 20 and fact. *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996). The
 21 Ninth Circuit holds that “the focal point of privilege waiver analysis should be the
 22 holder’s disclosure of privileged communications to someone outside the attorney-client
 23 relationship.” *Id.* at 341.

24 The communications at issue here are not privileged. The facts to which Ms. Sells
 25 may testify do not involve any confidential client communications, and thus Defendants
 26 have not waived the privilege with regard to this issue. It is therefore proper for
 27 Defendants to withhold documents containing attorney-client communications, and all

1 but one of the documents that Defendants have identified as protected by the attorney-
2 client privilege appear to contain communications to or from U.S. Bank personnel. *See*
3 Dkt. # 122-7 (Ex. G to Schulman Decl.) at 2–4 (Document Nos. 4, 20, 29, 38, 46, 47).
4 Document number 24 is listed as protected by the privilege, but no U.S. Bank employees
5 appear to be a party to that communication. *See id.* at 3. The court will thus perform an
6 *in camera* review of this document to determine whether it is protected and has properly
7 been withheld.⁴

8 2. Attorney Work Product Doctrine

9 Pursuant to Fed. R. Civ. P. 26(b)(3), “a party may not discover documents and
10 tangible things that are prepared in anticipation of litigation or for trial by or for another
11 party or its representative” unless “the party shows that it has substantial need for the
12 materials to prepare its case and cannot, without undue hardship, obtain their substantial
13 equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(A)(ii).

14 Here, Plaintiffs contend that they cannot obtain the information contained within
15 the documents they seek from any other source. Dkt. # 112 at 9. However, Defendants
16 identified Ms. Sells as a potential witness over a year ago, and Plaintiffs evidently
17 overlooked this disclosure. *See* Dkt. # 122-1. Had they noticed that Ms. Sells was listed
18 as a potential witness in April 2012, Plaintiffs may have been able to obtain the
19 information they sought through a deposition of Ms. Sells, or through a more thorough
20 questioning of Ms. Creekmore with regard to Ms. Sells’s contentions. The fact that
21 Plaintiffs made *no* attempt to obtain this information via other means undercuts its
22 showing of “undue hardship.”

23 However, the court is troubled by the fact that Defendants disclosed the privilege
24 log after the discovery deadline, and that the first iteration of the log contained only a
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26 ⁴ Defendants also list document 24 as protected by the work product doctrine. *See* Dkt.
27 # 122-7 at 3. If the court finds that the attorney-client privilege does not apply to that document,
it will review whether the work product doctrine applies.

one-line entry. *See* Dkt. ## 112 ¶ 7; 113-11 (Ex. K to Hammack Decl.). The fact that Defendants then apparently rushed to provide a more complete version, which it submitted mere hours later, raises concerns with the court about the attention to detail involved in the preparation of the log. *See* Dkt. # 113-13 (Ex. M to Hammack Decl.). While it appears to the court that Defendants have properly identified which documents are subject to the work product doctrine, and the court has no evidence that current counsel for Defendants have improperly withheld documents from Plaintiffs, the court will, in an abundance of caution, exercise its discretion and perform an *in camera* review. The court will review only those documents that appear to be directly relevant to the current issue and whose descriptions leave room (however slight) to question whether they properly fall under the work product doctrine. The court will review documents 21, 22, 23, 27, 30, 31, and 39. *See* Dkt. # 113-14 at 2–4.

3. Sanctions

The court will reserve ruling on the motion for sanctions until after it performs its *in camera* review. However, the court notes initially that it has reviewed the e-mails between counsel submitted by Defendants and is extremely displeased with the lack of professionalism exhibited by Plaintiffs' counsel. The court will further address this issue in its order on sanctions.

CONCLUSION

For all of the foregoing reasons, the court rules as follows: Plaintiffs' motion to compel and for sanctions is DENIED in part and GRANTED in part. The court GRANTS Plaintiffs' motion to perform an *in camera* review of documents 21, 22, 23, 24, 27, 30, 31, and 39. Defendants are ORDERED to submit these documents to the court within seven days of this order. The court DENIES Plaintiffs' motion to perform an *in camera* inspection of all other documents contained in the privilege log. The court reserves ruling on Plaintiffs' motion for sanctions at this time.

Dated this 8th day of May, 2013.

A handwritten signature in black ink, reading "Richard A. Jones", written over a horizontal line.

The Honorable Richard A. Jones
United States District Judge